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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CARLOS DIAZ, Defendant and Appellant.	2d Crim. No. B203878 (Super. Ct. No. MA025998) (Los Angeles County)

Appellant Carlos Diaz appeals from conviction by jury of second degree murder (Pen. Code, §§ 189/187, subd. (a))[1]. The jury found true allegations that appellant personally used a firearm causing death or great bodily injury and that the crime was committed for the benefit of a gang. (§§ 12022.53, subds. (b)-(d) & 186.22, subd. (b).) The trial court sentenced appellant to 15 years to life for the murder and a consecutive term of 25 years to life for the firearm allegation.

Appellant admitted to shooting Francisco Lopez-Reynaga. The jury rejected his claim of self-defense. He asserts juror misconduct and instructional error. We affirm.

[1] All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL HISTORY

On an evening in January 2003, appellant walked down a street with two other men. Appellant was a member of the "Santos" gang. He had a nine-millimeter semiautomatic pistol in his waistband. He told one of his companions that he blamed Lopez-Reynaga, a member of a rival gang, for sending him to juvenile detention camp. Two months earlier, Lopez-Reynaga had beaten appellant in a parking lot. After the fight, appellant had been arrested for possession of a firearm and served a term in juvenile detention camp.

As appellant and his companions walked, a car drove by. Appellant threw an "S" sign at the car. The car made a U-turn and stopped. Lopez-Reynaga got out of the car and approached appellant and his companions. A bystander saw the men exchange words or argue. Appellant pulled out a gun and shot Lopez-Reynaga three times. Appellant ran to the home of Rudy Vargas, got rid of the gun and washed up. Vargas's home was a known safe house for the Santos gang. Lopez-Reynaga drove away, but crashed his car and died later that day from the gunshot wounds.

One of appellant's companions told investigators that Lopez-Reynaga asked, "Where you from," and that appellant said he was from the Eastside, Santos gang. Lopez-Reynaga said, "So you want me down, or you want blast?" It did not look like Lopez-Reynaga had a gun. Appellant's companion said to appellant, "Hey why don't you just give me the gun, and get down with that fool dog," because "[t]hat's all he really wants to do and he don't even look like he got a gun or nothing." Appellant said, "Nah, fuck that," before shooting Lopez-Reynaga.

Witnesses testified on appellant's behalf that Lopez-Reynaga had previously threatened appellant. Appellant testified that he shot Lopez-Reynaga because he believed Lopez-Reynaga was armed and was going to kill him. Appellant denied being a gang member. He believed Lopez-Reynaga was angry with him because he had sexual relations with Lopez-Reynaga's girlfriend. He heard Lopez-Reynaga was looking for him and bought a gun to protect himself . According to appellant, as Lopez-Reynaga

approached, his hand was near his waistband and he looked angry. Appellant thought he was going to be killed so he shot Lopez-Reynaga.

DISCUSSION

(a) Juror Misconduct

We independently review the record to determine first whether there was jury misconduct and next whether the misconduct was prejudicial. (*People v. Danks* (2004) 32 Cal.4th 269, 302-303.) Juror misconduct occurs when a juror obtains information about the case that was not part of the evidence received at trial, even if the exposure was involuntary. (*In re Hamilton* (1999) 20 Cal.4th 273, 294-295.) Where misconduct involves receipt of extraneous information, we will set the verdict aside only if there appears a substantial likelihood of juror bias under one of two tests: (1) the extraneous material, judged objectively, is inherently and substantial likely to have influenced the juror, or (2) the nature of the misconduct and the totality of the circumstances surrounding the misconduct establish that a substantial likelihood of actual bias arose. (*Danks, supra,* at p. 303.) Whether prejudice arose is a mixed question of law and fact subject to our independent determination, but we accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*Id.* at p. 304.) Relevant factors include the strength of the evidence that misconduct occurred and the nature and seriousness of the misconduct. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417.)

The record does not demonstrate that any misconduct occurred. Appellant contends that Juror No. 12 had extraneous information that people sitting in the courtroom were members of the Vargas family, and that jurors may have believed these people were gang members associated with appellant. Several of appellant's witnesses were members of the Vargas family. During deliberations, a juror wrote a note to the judge stating, "'One of the jury made a comment yesterday about he knew that the Vargas family were sitting in the courtroom. How could he have known, unless he had prior knowledge?'" She identified the juror as Juror 12.

The trial court questioned and admonished Juror 12 outside the presence of the other jurors. Juror 12 initially denied, but then acknowledged, that he had mentioned one of the Vargas sisters to other jurors. He said he did not know anyone involved in the case and that the other juror took his comment out of context.

Appellant has not established that Juror 12 had any extraneous information. The juror denied having any knowledge of the Vargas family. The record suggests that jurors speculated throughout the trial about the identity of the courtroom audience. Earlier in the proceedings, a juror submitted a note asking, "'Do we, as jurors, need to be worried about our safety because of possible gang retaliation?'" When questioned, she said, "[T]here's people in the court, we don't know who they are. . . . I just needed to know if there is any possibility that, you know, if it is gang-related, that we're going to end up getting targeted in some way, shape or form." She said she had not formed an opinion whether the case was gang related or whether appellant was a gang member and that her concern would not impact her deliberations. Defense counsel pointed out that the people in the courtroom were "all family members" and that the family resemblance was obvious.

At another point in the proceedings, an alternate juror reported that she had been approached and questioned by someone on the break and was concerned for her safety. Defense counsel told the court he had "two members of the family here . . . ." He asked the juror if the person who approached her was anyone she had seen in the courtroom. The trial judge also asked the juror if it was someone she recognized from the courtroom. It was not. The record discloses no overt event or circumstance suggesting a likelihood that Juror 12, or any other juror, was exposed to outside information about the case. (*In re Hamilton, supra,* 20 Cal.4th at p. 294.)

Even if a juror had been exposed to outside information identifying an audience member as a member of the Vargas family, any misconduct was trifling and there is no substantial likelihood of prejudice. "Where the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside. [Citation.]" (*Enyart v. City of Los Angeles*

(1999) 76 Cal.App.4th 499, 507.) Juror 12 said he understood that any assumptions about the audience members could not be the basis for a verdict. The trial court admonished the full jury that its deliberations should be based only on the evidence presented in trial, and not "on speculation, specifically as to who you may or may not believe was sitting in the courtroom, family members or otherwise, during the course of the trial." There is no substantial likelihood either that information about audience members was inherently and substantially likely to have influenced the jury, or that there was any misconduct of a nature to establish that a substantial likelihood of actual bias arose.

(b) Self-Defense Instruction

We independently review claims of instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 581, 584.) Objection to instructional error must be made at trial or it is forfeited on appeal, unless the error affects the substantial rights of the defendant. (§ 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193.) "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

(b)(i) Imminent Danger

Appellant contends the trial court erred by giving a special instruction defining "imminent danger." The instruction followed instructions on perfect and imperfect self-defense and CALCRIM No. 505, which requires belief in imminent danger or great bodily injury to support either defense. Defense counsel stated generally, "I am going to object to this," but did not elaborate further, did not specify the basis for his objection and did not ask the court to modify or clarify the proposed special instruction. Even if his general objection preserved his objection, the instruction was a correct statement of law and was not given in error.

A previous threat, unaccompanied by any immediate demonstration of force at the time of the encounter, does not constitute imminent danger. (*People v. Aris*

(1980) 215 Cal.App.3d 1178, 1188, disapproved on other grounds in *People v. Humphrey* (1989) 13 Cal.4th 1073.) The trial court instructed the jury that imminent danger "means that the danger must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. [¶] In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future." This instruction was approved in *Aris*. (*Id.* at p. 1187.)

In *Aris*, a woman shot her sleeping husband after he had beaten her and threatened that she would not live until morning. (*People v. Aris*, *supra*, 215 Cal.App.3d at pp. 1184-1185.) The court held that "a defendant should not be excused from guilt of murder when he or she kills the one who threatened death or serious bodily injury unless the defendant at least actually, if not reasonably, perceives in the victim's behavior at the moment of the killing an indication that the victim is about to attempt, or is attempting, to fulfill the threat. In making that evaluation, the defendant is entitled to consider prior threats, assaults, and other circumstances relevant to interpreting the attacker's behavior." (*Id.* at p. 1189.) Here, the instruction was correct and was given with instructions that the jury could take into account any prior threats by Lopez-Reynaga and that someone who has been threatened by a person in the past "is justified in acting more complete or taking greater self-defense measures against that person."

There was substantial evidence to support a finding that appellant believed his rival would harm him at some time in the future, and killed him preemptively by provoking him out of his vehicle with gang signals and then shooting him as he approached unarmed. The instruction was a correct statement of law and was supported by substantial evidence.

(b)(ii) Provocation

Appellant contends there was no substantial evidence to support CALCRIM No. 3472 which provides, "A person does not have a right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Appellant forfeited this contention because he did not object to the instruction at trial. The instruction was not erroneous and did not affect appellant's substantial rights.

CALCRIM No. 3472 is a correct statement of the law and may be given when supported by substantial evidence. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) There was substantial evidence that appellant provoked a quarrel with the intent to use violence when he threw gang signs at a vehicle while armed.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Lisa M. Chung, Judge

Superior Court County of Los Angeles

George O. Benton, under appointment by the Court of Appeal, for Defendant and Appellant.

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